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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ERIC PENA,

Defendant and Appellant.

G054582

(Super. Ct. No. 10NF0523)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Juan Eric Pena on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against his client but advised the court he found no issues to argue on his behalf. We gave Pena 30 days to file written argument on his own behalf, which he did.

Counsel filed a brief following the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). The court in *Wende* explained a *Wende* brief is one that sets forth a summary of proceedings and facts but raises no specific issues. Under these circumstances, the court must conduct an independent review of the entire record. When the appellant himself raises specific issues in a *Wende* proceeding, we must expressly address them in our opinion and explain why they fail. (*People v. Kelly* (2006) 40 Cal.4th 106, 110, 120, 124 (*Kelly*).)

Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), to assist the court with its independent review, counsel provided the court with information as to issues that might arguably support an appeal. Counsel raised the following two issues: (1) whether the trial court erred by denying Pena's motion to relieve his court appointed counsel; and (2) whether the court erred by sentencing Pena to serve 32 years to life in prison.

In his supplemental brief, Pena asserts there was a clerical error in the reporter's transcript. He indicates that rather than testifying he wanted to "wound" the victim, he testified he wanted to "warn" the victim. He alleges the court prejudicially erred by denying his motion to bifurcate and set aside the gang evidence. Pena asserts he would likely have received a better result had the gang evidence been excluded. He also alleges instructional error because the court failed to instruct the jury on manslaughter and his attorney was ineffective for failing to request the instruction. Pena also contends the court erred by requiring him to register as a gang member, as described in section

Penal Code section 186.30.¹ Lastly, Pena argues both trial and appellate counsel were ineffective for failing to raise the issues Pena raised in his supplemental brief.

After briefing was complete, we invited supplemental letter briefs on the issue of whether the trial court erred by requiring Pena to register as a gang member pursuant to section 186.30. Appellate counsel filed a supplemental brief noting the trial court vacated the gang registration requirement. Pena filed a second supplemental brief, raising the same errors he argued in his first brief.

We have reviewed the record in accordance with our obligations under *Wende* and *Anders*, the information provided by counsel, and the issues Pena raised in his two supplemental briefs. We found no arguable issues on appeal. The judgment is affirmed.

FACTS

In September 2013, an amended information charged Pena with the following: conspiracy to commit murder (§ 182, subd. (a)(1)) (count 1); assault with a firearm against Thomas Coffman (§ 245, subd. (a)(2)) (count 2); assault with a firearm against Alexis Uribe (§ 245, subd. (a)(2)) (count 3); attempted murder of Miguel Sanchez (§§ 664, subd. (a), 187, subd. (a)) (count 4); attempted murder of Felipe Sanchez (§§ 664, subd. (a), 187, subd. (a)) (count 5); attempted murder of Aaron Guardado (§§ 664, subd. (a), 187, subd. (a)) (count 6); and street terrorism (§ 186.22, subd. (a)(1)) (count 7). The information alleged the following enhancements: street terrorism (§ 186.22, subd. (b)(1)), as to counts 1 through 6; personal discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)), as to count 4; personal discharge of a firearm (§ 12022.53, subd. (c)), as to counts 5 and 6; personal use of a firearm (§ 12022.5, subd. (a)), as to counts 1 through 6; and vicarious use of a firearm by a gang member

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All further statutory references are to the Penal Code.

(§ 12022.53, subds. (b), (e)(1)), as to counts 1, 2, and 3. On the prosecutor's motion, the court dismissed count 1.

The jury found Pena guilty of willful and premeditated attempted murder (count 4), and street terrorism (count 7). As to count 4, the jury found Pena personally discharged a firearm causing great bodily injury to the victim (§ 12022.53, subd. (d)), acted for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury acquitted Pena of counts 2, 3, and 6. The jury was unable to reach a verdict on count 5, and the court dismissed the count on the prosecution's motion. The trial court sentenced Pena to 40 years to life in prison consisting of 15 years to life for the attempted murder offense based on the gang enhancement finding, and a consecutive term of 25 years to life for the firearm enhancement finding.

On appeal, Pena raised the following two issues: (1) whether insufficient evidence supports his conviction for street terrorism and the jury's finding on the street terrorism enhancement; and (2) whether the court erred by allowing the gang expert to testify regarding his conversations with Pena's brother Gilberto and Pablo Hernandez.

This court reversed the gang enhancement and gang participation offense findings because they were not supported by legally sufficient evidence. A recitation of the facts underlying each of the counts is not necessary to resolve this appeal, but are provided in our prior unpublished opinion. (*People v. Pena* (Nov. 12, 2015, G049885) [nonpub. opn.].)

The trial court resentenced Pena in absentia. The court vacated the sentence on the gang enhancement and dismissed the gang participation offense. It resentenced Pena to 32 years to life in prison. When he learned about the resentencing proceeding, Pena, who was serving his prison sentence, wrote a letter to the trial court and objected he was not present in court for the resentencing hearing. Pena also filed a notice of appeal challenging the court's actions at the resentencing hearing.

At his request, Pena was returned to the Orange County Superior Court for another resentencing hearing. The trial court began by hearing Pena's *Marsden*² motion. The court cleared the courtroom except for court staff, Pena, and his court appointed counsel. The court ordered the transcript of the hearing sealed. Pena complained his appointed trial counsel did not tell him about the resentencing and did not communicate with him as much as Pena believed he should. Pena expressed a desire to file a motion for new trial and indicated trial counsel would not do it for him. In conclusion, Pena noted he believed he was receiving ineffective assistance of counsel because of a lack of communication from counsel and his distrust of counsel.

The trial court asked counsel if he had anything to add. Counsel stated this was the fourth *Marsden* motion Pena had filed. He noted that at times Pena was thrilled with counsel's representation and then an hour later he complained he was receiving terrible representation. Counsel stated he did not "know what's going on in . . . Pena's head." Counsel admitted he had erred in waiving Pena's presence for resentencing, but expressed a belief he had corrected the error. The court asked counsel if he could communicate with Pena and discuss with him the possibility of other appellate options. Counsel indicated he would. The court gave Pena another opportunity to address the court, and Pena reiterated his complaint counsel did not adequately communicate with him.

The trial court denied Pena's motion to relieve his court-appointed attorney, concluding any breakdown in communication could be remedied. The court opined trial counsel was in a far better position to assist Pena with posttrial matters because he was present at the trial. Lastly, the court noted that although Pena had not been present for

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People v. Marsden (1970) 2 Cal.3d 118.

the initial resentencing, the court had sentenced him to the lowest sentence permissible by law.

Months later, Pena was present in court at a new resentencing hearing. The court again vacated the sentence on the gang enhancement and dismissed the gang participation offense. It resentenced Pena to 32 years to life in prison for count 4, plus a consecutive term of 25 years to life in prison for firearm enhancement finding. The court ordered all other terms of the original sentence to remain in effect. One of the terms of the original sentence was that Pena register as a gang member pursuant to section 186.30. Pena filed a timely notice of appeal.

DISCUSSION

In his supplemental brief, Pena argued it was error for the trial court to impose gang registration at the resentencing after remand. After reviewing the record, we determined the imposition of gang registration was an arguable issue. We invited supplemental briefing on the issue of whether the court erred when it imposed a registration requirement pursuant to section 186.30.³ In response, appellate counsel provided this court with a copy of the court's minutes from July 28, 2017. On that date, the court vacated the section 186.30 registration requirement rendering this issue moot. Pena's remaining claims are precluded because those claims could have been raised in his first appeal.

The scope of a defendant's appeal from judgment resentencing him on remand following reversal of conviction is limited to matters arising in connection with the second sentencing. (*People v. Pineda* (1967) 253 Cal.App.2d 443, 448-449, 455.) All available arguments must be raised in the initial appeal from a judgment. (*People v.*

³ Section 186.30 requires that any person convicted of a gang offense or gang enhancement set forth in section 186.22, subdivisions (a) and (b), respectively, must register with law enforcement.

Senior (1995) 33 Cal.App.4th 531, 535.) California law precludes a criminal defendant from raising contentions in a piecemeal fashion by successive proceedings attacking the validity of the underlying judgment. (*Id.* at p. 537.) Thus, when a defendant had an opportunity to challenge his sentence in an earlier appeal and failed to do so, he or she may not belatedly raise the same issue in a later appeal. (*Id.* at pp. 534-535.) The issues the defendant failed to raise in the earlier appeal are deemed waived, absent a showing of good cause or justification for the delay. (*Id.* at p. 533.) When all of the factual predicates of the second appeal existed at the time of the first appeal, there is no justification for failing to raise the new issues in the earlier appeal. (*Id.* at p. 538.)

All the facts necessary to make a claim of error in the denial of a motion to bifurcate the gang counts and a claim of instruction error were available at the time of his initial appeal. Pena has made no showing of good cause or justification for not raising these issues in his first appeal. Accordingly, these issues are deemed waived.

Pena argues, for unspecified reasons, trial counsel was ineffective and appellate counsel was ineffective for failing to raise the issues Pena raised in his supplemental brief. A claim of ineffective assistance of counsel is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's action or inaction was not a reasonable tactical choice, and in most cases ““the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged”” (*Id.* at p. 266.) Accordingly, we decline to address Pena's claim of ineffective assistance of counsel as part of this appeal.

A review of the record pursuant to *Wende, supra*, 25 Cal.3d 436, and *Anders, supra*, 386 U.S. 738, including the possible issues raised by appellate counsel, has disclosed no reasonably arguable appellate issue.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.